BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))))	CG Docket No. 02-278

COMMENT BY WALTER C. ONEY, JR. OPPOSING ACA INTERNATIONAL'S PETITION FOR AN EXPEDITED CLARIFICATION AND DECLARATORY RULING[1]

I respectfully submit the following comment in opposition to the petition filed in this proceeding by ACA International (ACA). ACA asks the commission to hold, in effect, that third-party debt collection agencies may use predictive dialers to dun consumers on their cell phones notwithstanding the statutory prohibition contained in the TCPA, 47 U.S.C. § 227(b)(1)(A). I believe that ACA's request is unreasonable for at least three reasons. First of all, ACA has mischaracterized the nature of the debt collection industry and painted far too rosy a picture of the degree to which that industry, including its own members, honor consumer rights under other laws. Additionally, persons who are not "consumers" for purposes of the Fair Debt Collection Practices Act have no recourse ***except*** under the TCPA to combat certain common abuses by debt collectors. Finally, ACA's members are distorting the law and their own motives in making this request.

In short, to be true to Congressional intent, the Commission should deny ACA's petition.

I. ACA MISCHARACTERIZES THE NATURE OF THE INDUSTRY IT REPRESENTS AND OF THE PHONE CALLS ITS MEMBERS MAKE

[1] Mr. Oney is an attorney in private practice in Boston, Massachusetts. His practice includes representation of consumers in the Bankruptcy Court and in state and federal courts to redress unfair debt collection practices and injuries from illegal telemarketing. A substantial part of Mr. Oney's practice is devoted to pro-bono representation of indigent debtors in bankruptcy proceedings.

The business of debt collection in America has an unenviable reputation for abuse. The problem of abusive tactics in the collection of debts became so bad by 1977 that Congress enacted the Fair Debt Collection Practices Act (FDCPA), Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977). Congress made the following observation:

> There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

15 U.S.C. § 1692(a).

Pursuant to Congressional mandate, *see* 15 U.S.C. § 1692m(a), the Federal Trade Commission submits an annual report summarizing its administrative and enforcement actions. The FTC's 2006 report was released just last week, on April 14, 2006.[2] It notes that the FTC continues to receive more consumer complaints about third-party debt collectors than about any other specific industry. (FTC Report at 2-3) In 2005, 21.5% of the FDCPA complaints the FTC received alleged that collectors harassed consumers by calling repeatedly or continuously. (FTC Report at 4) The FTC concluded that "[a]lthough many debt collectors covered by the FDCPA already comply with the statute, the [FTC] continues to receive a significant number of complaints about those who do not." (FTC Report at 12)

ACA's petition should be understood against the preceding background. ACA styles itself as "an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services." (ACA Pet. at 4).

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[2] *See* http://www.ftc.gov/os/2006/04/P0648042006FDCPAReport.pdf (visited April 16, 2006). The FTC's 2006 FDCPA Report is cited in the text as "FTC Report."

Calling what ACA's members do the management of accounts receivable disguises what they ***actually*** do, which is to dun consumers to pay debts that are in default. Since the classification of a debt as an account receivable implies currency and collectibility, it is doubtful whether defaulted consumer debts should even be called "accounts receivable". *Cf.* Federal Financial Institutions Examination Council, *Uniform Retail Credit Classification and Account Management Policy*, 65 Fed. Reg. 36903 (June 12, 2000) (open-end retail loans should be classified "loss" and charged off when past-due for 180 days).[3]

ACA states that "[t]he company-members of ACA comply with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA." (ACA Pet. at 4) This is an important statement, which the Commission should parse with care. First of all, ACA can hardly know that ***all*** of its members comply with ***all*** applicable laws and regulations ***all*** of the time. Three anecdotes suffice to demonstrate the contrary. In *Hage v. Gen. Serv. Bureau,* 306 F. Supp. 2d 883 (D. Neb. 2003), an ACA member had recovered collection fees alleged to exceed amounts permitted by law. In *Chuway v. Nat'l Action Fin. Servs.,* 362 F.3d 944 (7th Cir. 2004), another ACA member had sent a dun that was so confusing that even the Seventh Circuit panel needed it explained during oral argument. Finally, *Bingham v. Collection Bureau, Inc.,* 505 F. Supp. 864, 866 (D.N.D. 1981), involved a number of harassing statements by an ACA member, including the suggestion by a collection agent that the consumer should not have children if she couldn't afford the hospital bill for them.

[3] The "loss" designation for a credit account means "uncollectible, and of such little value that its continuance on the books is not warranted." 65 Fed. Reg. 36904 n.1. The FFIEC policy mandates "loss" classification for loans in bankruptcy, fraudulent loans, and loans of deceased persons as well as for 180-past-due open-end accounts. *Id.* at 36904-36905.

ACA's reference to "ethical standards and guidelines established by ACA" also deserves scrutiny. These standards obligate members to refrain from ***knowingly*** violating the FDCPA, or any other state or federal law pertaining to debt collection, ***with reckless disregard for its provisions.*** ACA Rules 2.01 & 2.02.[4] They also prohibit members from "engag[ing] in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public." ACA Rule 2.06. Conspicuously absent from the standards is any hint that members ought to be sensitive to the privacy rights of the general public.

ACA suggests that the industry to which its members belong "is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering payments," and it goes on to say that "[i]n so doing, Congress committed the regulation of the recovery of debts to the jurisdiction of the Federal Trade Commission." (ACA Pet. at 4). Nowhere in the FDCPA is there any suggestion that the FTC is the ***only*** federal agency whose regulations might impinge on communications between debt collectors and consumers. Neither is there any intimation in the FDCPA that Congress intended the FDCPA to be the ***only*** federal law that might so impinge. *Cf. Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) ("Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both").

ACA states that calls from its members to consumers "are limited to customers of creditors who have received a service or product without payment." Would that it were so. In fact, consumers receive dunning calls for bills owed by somebody else who

[4] ACA INTERNATIONAL, CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY, available at http://www.acainternational.org/images/2344/CodeofEthics.pdf (visited April 16, 2006).

happens to share a name or who used to have the same address or phone number, and for bills incurred by identity thieves. *Cf., e.g., Erickson v. Johnson,* 2006 U.S. Dist. LEXIS 6979 (D. Minn. 2006). Debt collectors call neighbors, co-workers, and employers for the purpose of shaming consumers into paying debts. *Cf., e.g., West v. Nationwide Credit, Inc.*, 998 F. Supp. 642, 645 (W.D.N.C. 1998).[5] They call consumers over and over again. *Cf., e.g., Kuhn v. Account Control Technology,* 865 F. Supp. 1443, 1453 (D. Nev. 1994) (6 calls within 24 minutes).[6]

ACA is simply wrong when it says its members obey all laws, that the FDCPA somehow precludes the Commission from regulating one aspect of the debt collection business, and that the only people who will be called by its members' predictive dialers are consumers who owe debts. The Commission should deny ACA's request for a "clarification" that would eviscerate the Congressional determination that automated equipment must not be used to call emergency numbers, health care facilities, or numbers for which the called party pays.

II. CONSUMERS NEED THE ADDITIONAL PROTECTIONS OF THE TCPA'S AUTODIALER PROHIBITION

Consumers need the protection of the TCPA in addition to the FDCPA. Section 805 of the FDCPA, 15 U.S.C. § 1692c, regulates "communications" in general. That section protects only persons who owe, or who are alleged to owe, a debt, however.[7] Thus, in *Montgomery v. Huntington Bank,* 346 F.3d 693, 697 (6th Cir. 2003), the plaintiff was denied recovery under § 1692c because the debt in question was owed by his mother. *Accord, Kropelnicki v. Siegel,* 290 F.3d 118, 130-131 (2d Cir. 2002) (letter addressed to

[5] Nationwide Credit, Inc. is an ACA member.
[6] Account Control Technology is an ACA member.
[7] *See* 15 U.S.C. § 1692a(3) (definition of "consumer").

someone else); *Burdett v. Harrah's Kan. Casino Corp.*, 294 F. Supp. 2d 1215, 1227 (D. Kan. 2003) (letters addressed to plaintiff's decedent). *See also Conboy v. AT&T Universal Card Servs. Corp.*, 84 F. Supp. 2d 492, 504-405 (S.D.N.Y. 2000) (plaintiff lacked standing under § 807(11) of FDCPA to sue for 30-50 telephone calls about debt owed by daughter-in-law), *aff'd,* 241 F.3d 242 (2d Cir. 2001).

The FDPCA contains a very limited prohibition on phone calls made at a consumer's expense:

> [t]he following conduct is a violation of this section … [c]ausing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

15 U.S.C. § 1692f(5). The crux of this subsection is ***concealment.*** According to the FTC Staff, "[a] debt collector may not call the consumer collect or ask a consumer to call him long distance ***without disclosing the debt collector's identity and the communication's purpose***." 53 Fed. Reg. 50108 (Dec. 13, 1988) (emphasis added). Informally, the FTC Staff once said that collect calls ***after writing to a consumer*** would be permissible because they would not involve concealment of the purpose of the call. (FTC Staff Letter to Fred K. Ellison, April 12, 1978).[8]

As suggested by the National Consumer Law Center in the comment it filed in this proceeding, a debt collector may trick a consumer into answering a call to a cell phone by spoofing caller identity information. The Commission's regulations under the TCPA do not presently prohibit "telespoofing" by persons who are not engaged in telemarketing. *Cf.* 47 C.F.R. § 64.1601(e) (persons engaged "in telemarketing" must transmit caller

[8] A copy of the Ellison letter is annexed as Exhibit A.

identification information). Since recovery of statutory damages under the FDCPA is capped at $1,000 regardless of the number of infractions,[9] a rational debt collector who is disposed to violate the FDCPA in other respects might well decide that telespoofing is a smart tactic because it will not lead to additional sanctions.

In summary, the FDCPA does not attempt to reach the conduct proscribed by § 227(b)(1)(A) of the TCPA, namely the use of computerized dialing equipment to place calls to emergency numbers, health care facilities, or services for which the called party is charged for the call. ACA is simply wrong to suggest that the Commission should (even if it could) create an exemption to § 227(b)(1)(A).

III. THE COMMENTS OF ACA MEMBERS IN SUPPORT OF ACA'S PETITION MISSTATE THE APPLICABLE FACTS AND THE LAW.

The fifty-five identical comments filed in this proceeding by various employees of Americollect, Inc. illustrate the lengths to which the debt collection industry is willing to go to distort what it really does with technology. Each comment but one recites that the signer is an employee of Americollect.[10] Each comment states that "autodialer technology is the most accurate way for me to call consumers about their past due payment obligations."[11] Identical or similar comments have also been filed by employees of Collection Service Bureau, Inc., FMA Alliance, Ltd., Amcol Systems, Inc., ProSource Billing, Inc., J.C. Christensen & Associates, Inc., Central Bonded Collectors, Hollis Cobb

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[9] 15 U.S.C. § 1692k(a). *See, e.g., Harper v. Better Business Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992).

[10] The exception is the comment filed by Joseph A. Rupert, Quality Assurance Manager. Mr. Rupert's comment is otherwise identical to the other 54.

[11] One of the "employees" who submitted a comment was Kenlyn Gretz, who is actually the owner of the company. *See* http://americollect.com/40th_page.htm (visited April 16, 2006). The Commission may well doubt that Mr. Gretz spends any time calling consumers. According to the company's web site, it has 25 collectors. *See* http://americollect.com/advan.htm (visited April 16, 2006). Presumably, therefore, only 25 of the letters sent to the Commission could properly claim that "autodialer technology is the most accurate way for ***me*** to call consumers about their past due payment obligations." (emphasis added).

Associates, Medical & Professional Collection Services, Inc., and other ACA members. Except that this flood of identical rhetoric helps to drown out the voices of individual consumers, it is difficult to see how mind-numbing repetition of the same few points serves any purpose.

The Commission should treat all of these letters as being a single comment by ACA's collective membership. And that comment reveals a startling lack of empathy for the privacy rights of consumers. Here, in tabular form, is a summary of what ACA's members say and what the reality is:

ACA's members say…	**But the truth is…**
The TCPA "was designed to protect consumers from invasive calls from telemarketers."	The purposes of the TCPA were twofold: "to protect the privacy interests of residential subscribers … and to facilitate interstate commerce by restricting certain uses of … automatic dialers." S. Rep. No. 102-178 (Oct. 8, 1991).
"Between 1991 and 2003, the FCC consistently ruled that this autodialer prohibition did not apply to calls made using an autodialer *if the sole purpose of the calls was to recover payments for goods and services already purchased.*" (emphasis in original)	The Commission concluded in 1992 that debt collection calls are exempt from the prerecorded announcement prohibition.[12] In 1995, the Commission was asked to clarify the exemption in the context of automatically dialed calls that omit to identify the caller as a debt collector, and it repeated that debt collection calls are exempt from the prerecorded message prohibition contained in § 227(b)(1)(B).[13] The Commission has ***never*** ruled that debt collection calls are exempt from § 227(b)(1)(A).

[12] *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 7 F.C.C.Rcd. 8752, 8771-8773 ¶ 36-39 (FCC 92-443, Oct. 16, 1992).

[13] *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* Memorandum Opinion and Order, 10 F.C.C. Rcd. 12391, 12399-13400 ¶ 16-17 (FCC 95-310, Aug. 7, 1995). *Accord, In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 F.C.C.Rcd. 14014, 14079 ¶ 113 n.358 (reaffirming that terminating an EBR will not affect debt collector's ability to call debtors) (hereinafter cited as 2003 TCPA Order); 68 Fed. Reg. 4664 n.1020 (Jan. 29, 2003) (debt collection calls are not telemarketing for purposes of FTC Telemarketing Sales Rule).

The Commission "should not uphold an unsupportable and damaging regulatory interpretation that will encourage the evasion and nonpayment of debts …."	The Commission's regulations under the TCPA are entirely neutral insofar as the payment or nonpayment of debts is concerned.
"[Name of company] uses predictive dialers to complete transactions …."	Creditors do not normally hire third-party collection agents until debts are in default. A collection call is a far cry from a call "whose purpose is to facilitate, complete or confirm a commercial transaction."[14]
"… for which consumers have obtained a benefit, without payment."	This rather assumes a self-serving result, namely that the only calls made by a predictive dialer will be to consumers who owe a debt. It also ignores the fact that many consumers whose debts are placed into collection have already made substantial payments, sometimes totaling many times the original principal amount owed, but have been unable to keep up with late fees and penalty interest charges.
"Autodialers increase the accuracy of dialed numbers …."	Garbage in, garbage out. In other words, if a predictive dialer is programmed with a ***wrong*** number, or with a ***stale*** number, or with the number of someone who merely lives where the targeted debtor used to live or who has the same last name, the predictive dialer will reliably and accurately dun the wrong person, whom the human agent will likely accuse of lying when that person protests.
"[C]reditors and their collection agents face the devastating loss of an essential technological tool, namely the autodialer."	They must simply ***continue*** to avoid using their technology to dial emergency numbers, health care facilities, or wireless or other numbers ***for which the consumer is charged for the call.*** The TCPA does not restrict ***live*** calls to cell phones or ***automatic*** calls to landlines.[15]
"[A]utodialer technology is directly or indirectly responsible for returning tens of billions of dollars each year to the U.S.	All that happens when a third-party collector succeeds is that money is transferred from one pocket to another—

[14] *Cf. In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, ___ F.C.C.Rcd. ___, ¶ 49 (FCC 06-42, April 6, 2006) (recognizing that transactional messages are not advertisements for purposes of junk fax prohibition).
[15] *See* 2003 TCPA Order at 14091-14092, ¶ 133.

economy."	the money would have been used in other sectors of the U.S. economy for purposes like food, shelter, and health care.[16] Moreover, old debts are increasingly sold in securitized packages that benefit investors who may not even reside in the U.S.

The one ***true*** statement in the ACA member comment is this one: "If allowed to stand *[sic]*, the long-term consequences of the FCC's decision are foreboding at best." This is a ***true*** statement of the impact on the debt collection business because collection agents will incur costs to scrub their lists of consumer contact numbers to exclude emergency numbers, health care facilities, and cell phones. They will not be able to achieve "exponential" growth in productivity because they will have to take care not to annoy (or worse) innocent persons whose numbers happen to be accurately dialed, over and over again, from sunrise to sunset,[17] just so that the efficiency of a collection mill can be maximized.

It is also true, but unsaid in the ACA member submission, that the consequences to consumers if the Commission's decision does ***not*** stand are foreboding indeed. The Commission can easily discern which side of this argument is motivated by profit and which by a legitimate concern for individual privacy, and it should reject ACA's cynical attempt to create a loophole through which the entire collection industry can fire away at hapless consumers, unchecked by the rule of law.

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[16] *See, e.g.*, E. WARREN & A. TYAGI, THE TWO INCOME TRAP, 49-54 (Basic Books 2003) (debunking myth that families are in financial trouble due to overconsumption).

[17] "Americollect has a predictive dialer and we use it! Our dialer is running from sun up to sun down. … Remember, the dialer multiples the number of accounts that can be worked exponentially." http:/americollect.com/advan.htm (visited April 16, 2006). Americollect goes on to brag that it "rang 759,970 phones" during 2004, connecting to 473,343 consumers or their answering machines. *Quaere* what happened with the ***other*** 286,627 phones that were rung, given the supposed accuracy of autodialer technology.

Dated: April 21, 2006

/s/ Walter C. Oney, Jr.
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617-227-5620

EXHIBIT A

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

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BUREAU OF
CONSUMER PROTECTION

April 12, 1978

Mr. Fred K. Ellison, President
Action Collections
P. O. Box 16980
Lubbock, Texas 79490

Dear Mr. Ellison:

This will acknowledge receipt of your letter dated March 20, 1978 regarding the validity under the Fair Debt Collection Practices Act, of various collection activities about which you inquire. You ask whether it is permissible to contact consumers who have given firms, which you represent, checks which have been returned for insufficient funds, accounts closed, etc. You ask whether you can telephone these individuals collect, and request them to pay not only the amount of the check but a $5.00 service charge as well.

It is permissible for your agency to directly contact consumers who have given checks which have not been honored. However, it is not permissible to cause charges to be made to any person for communications, such as collect telephone calls, by concealment of the true purpose of the call. (Section 808(5)). Unless the consumer is aware of the nature of the call before it is accepted, possible violation of this Section will occur. Of course, it would be proper to first write to the consumer identifying your agency and discussing the nature of your firm's involvement. Any subsequent collect call would not involve concealment of the purpose since the purpose was previously disclosed.

In this further respect it is important that the name Action Verification Service is used, if in fact that is the true name of the company, rather than Action Collections when a collect call is being made. This is required to protect against unauthorized disclosure of the nature of the communication to a third person which may occur if the telephone operator becomes aware of the nature of your call. This could result in a violation of the provisions of Section 808 of the Act.

Section 808(1) prohibits the collection of any amount unless that amount is expressly authorized by the agreement creating the debt or permitted by law. It is difficult to imagine that the posting of the notice calling the consumer's attention to the $5.00 service charge in the event the check is

dishonored can be declared to be an integral part of the agreement creating the debt. Although it could be argued that paying by check impliedly requires acceptance of the conditions dictated by the merchant, it is more realistic to view the statute as contemplating the need for an express understanding between the parties upon entering into the contract which creates the obligation that an amount certain will be added to any unpaid balance in the event that default occurs and collection becomes necessary. Nevertheless, in the event that state law permits collection of a service amount in addition to the amount of the check if notice is given to the drawer of the check at the time of issuance, collection of such an amount would be permissible under federal statute.

The above represents that staff's present enforcement position. Since this interpretation of the Act is informal in nature, it is not binding on the Commission.

Sincerely,

Alan D. Reffkin

Alan D. Reffkin, Attorney
Division of Credit Practices

Enclosure